

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW  
SACRAMENTO, CALIFORNIA

MAILED 5 10 PM 1989


In re: )  
Request for Regulatory )  
Determination filed by )  
Salmon Trollers Marketing )  
Association, Inc., con- )  
cerning Department of )  
Fish and Game procedures )  
to conform its commercial )  
salmon fishing regulation )  
(Title 14, California )  
Code of Regulations, sec- )  
tion 182.1) to the Pacif- )  
ic Fishery Management )  
Council's annual Salmon )  
Fishery Management Plan<sup>1</sup> )

1989 OAL Determination No. 10  
[Docket No. 88-012]

June 6, 1989

Determination Pursuant to  
Government Code Section  
11347.5; Title 1, California  
Code of Regulations,  
Chapter 1, Article 2

Determination by:

  
for JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Joseph Garcia, Senior Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether certain procedures followed by the Department of Fish and Game to conform its commercial salmon fishing regulation to the Pacific Fishery Management Council's annual Fishery Management Plan are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the particular procedures specified are not "regulations" and are not subject to the requirements of the APA.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether certain procedures followed by the Department of Fish and Game ("Department") to conform its commercial salmon fishing regulation--Title 14, CCR, section 182.1--to the Pacific Fishery Management Council's annual Fishery Management Plan pursuant to Fish and Game Code sections 7650-7655 are (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) "regulations" as defined in Government Code section 11342, subdivision (b), and (3) therefore violate Government Code section 11347.5, subdivision (a).<sup>4</sup>

THE DECISION 5, 6, 7, 8

OAL concludes that the procedures, as described in the Request for Determination, (1) are not "regulations" and therefore (2) are not subject to the requirements of the APA.<sup>9</sup>

I. AGENCY & PROGRAM, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency & Program

The Department of Fish and Game is part of the Cabinet-level Resources Agency of the State of California. The Department was established by the Legislature in 1951 as part of the Charles Brown Fish and Game Reorganization Act.<sup>10</sup> It is to be distinguished from the Fish and Game Commission ("Commission"), which was established by Article IV, section 20(b) of the California Constitution.

As presently constituted, the Department is charged with administration and enforcement of the California Fish and Game Code,<sup>11</sup> while general policies for the conduct of the Department are formulated by the Commission.<sup>12</sup> The Department is charged with, among other things, promulgating regulations for the purpose of fishery conservation. These regulations must be consistent with both state and federal law.<sup>13</sup>

In 1981, the California Court of Appeal summarized the early development of the Department's program for regulating the commercial ocean salmon fishery:

"In April 1976, Congress enacted the 'Fishery Conservation and Management Act of 1976' (16 U.S.C. secs. 1801 et seq.) [FCMA] to conserve and manage fishery resources in a 'fishery conservation zone' extending from three miles offshore to 200 miles offshore. The Secretary of Commerce was authorized to adopt regulations based on 'fishery management plans' to be developed by regional 'fishery management councils.' The regional council for the area of the coast of Washington, Oregon, and California is the Pacific Fishery Management Council [PFMC] composed of 13 members of whom three (including the [California Director of Fish and Game]) are from California. California's 'state . . . boundaries' include, along its Pacific shore, a zone extending three miles seaward.

"In September 1976, the California Legislature added to the Fish and Game Code a new article, beginning with section 7650, entitled 'Federal Regulation.' [Citations omitted.]"<sup>14</sup>

Fish and Game Code section 7652 grants to the Director of Fish and Game the authority to conform state regulations to the PFMC Annual Fishery Management Plan ("the PFMC Plan").

Later development of the program is summed up in the Agency Response filed by the Department in this proceeding:

"From 1978-1983, the Director routinely conformed State waters' regulations to the PFMC plans. However, during the 1983 season, a major . . . dispute arose in which the PFMC and the California commercial fishermen were at . . . odds. Silver salmon abundance appeared to the fisherman, with some statistical support from the Department, to be much higher than pre-season studies had indicated. However, Federal regulations did not permit silver salmon fishing north of Point Arena that year and the Director had no authority to repeal or amend the State regulations that conformed State to Federal regulations. The following year (1984), the Legislature gave the Director the authority to amend or repeal PFMC-sponsored regulations. This authority was provided by Senate Bill 2143 (Keene) which added Section 7652.2 (Statutes 1984, Chapter 1301).

"The 1988 PFMC plan confirmation hearings were held in Eureka and major concerns were expressed by the commercial fisherman of the Shelter Cove, Trinidad, and Eureka areas. The Shelter Cove fisherman, including fisherman that had relocated to the Shelter Cove area from more northern ports, expressed concern about their very small fishery and the safety hazards of the scheduled May closure for their area. Under the PFMC plan, local small boat fishermen in the Shelter Cove area would be required to run 50 miles each day to fish in open waters (south of Cape Vizcaino) throughout the month of May.

"Subsequent to the hearing, the Director decided to amend the PFMC plan to allow for a small boat fishery in the Shelter Cove area during the month of May by allowing for a limited catch of 8,000 king salmon (near the recent years' average) and to require all fish to be landed locally. Such a small fishery could be provided without adversely affecting the PFMC plan by reducing the king salmon quota for the area to the north by 6,200 fish, out a total quota for the area of 63,000. Thus, the safety of the local small boat operators would be protected while meeting the biological goals of the PFMC plan.

"The Director recognized there would be a small negative impact to the Eureka, Trinidad, and Crescent City commercial fishermen. However, the overall impact on the California commercial fishery would be positive because the 8,000 king salmon quota for the Shelter Cove fishery only required a 6,200 king salmon quota reduction in the Eureka-Crescent City area (due to different contribution rates of key salmon stocks to the respective areas)."  
[Emphasis added.]<sup>15</sup>

In summary, Fish and Game Code section 7652 provides authority for regulations which conform to the PFMC plan upon the

appropriate finding by the Director of Fish and Game, while section 7652.2 provides authority for modification of the Plan, including amendment or repeal of regulations adopted under section 7652, again upon an appropriate finding by the Director. If the latter power is to be exercised, notice and hearing, followed by a report to the Legislature, is required.

Authority<sup>16</sup>

Both the United States and California regulate fisheries. The federal FCMA provides that state regulations must be consistent with the standards adopted by the federal government or the state may forfeit its jurisdiction over the affected fisheries.<sup>17</sup>

Fish and Game Code section 7652 addresses the subject of conforming state statutes (or regulations of the Commission) to the PFMC plan. Section 7652 provides:

"Upon the preparation by the [Pacific Fishery Management] council, and the recommendation by the council to the secretary [of Commerce], of a fishery management plan or amendment thereto pursuant to the act, or upon the approval by the secretary of a fishery management plan, or amendment thereto, pursuant to the act, the director [of Fish and Game] may do the following to conform state law or regulations of the commission to the fishery management plan, or amendment thereto, if the director finds that the action is necessary to achieve optimum yield in California and that it is necessary to avoid a substantial and adverse effect on the plan by that state law or the regulations in order to continue state jurisdiction pursuant to Section 1856 of the act:

"(a) Adopt regulations that would make inoperative for up to one year any statute or regulation of the [Fish and Game] commission, including, but not limited to, statutes or regulations regulating bag limits, methods of take, and seasons for taking of fish for commercial purposes.

"Any regulation adopted by the director pursuant to this subdivision shall specify the particular statute or regulation of the commission to be inoperative.

"(b) Adopt regulations effective for up to one year governing phases of the taking of fish for commercial purposes which are not presently regulated by statute or regulation of the commission.

"(c) Adopt regulations effective for up to one year governing phases of the taking of fish for commercial

purposes which are presently regulated by statute or regulation of the commission, only if the statutes or regulations are first made inoperative pursuant to subdivision (a) for the effective period of the regulations adopted by the director. [Emphasis added.]"

Fish and Game Code section 7652.1 provides for hearings on fishery conservation and management plans or amendments and for reports to the Legislature in connection with such actions.<sup>18</sup>

Fish and Game Code section 7652.2 provides for the adoption, amendment or repeal of regulations by the Department and for hearings and reports to the Legislature in connection with those regulatory actions. Section 7652.2 provides:

"(a) The director may repeal or amend any regulation adopted pursuant to Section 7652 or any other regulation to conform the regulation to federal regulations pursuant to the act, if the director finds that this action is necessary to achieve optimum yield in California.

"(b) Notwithstanding any other section of this article or any other provision of law, the director shall hold a public hearing or hearings in the area of the fishery under consideration before the director repeals or amends any regulation pursuant to this section. The director shall arrange the time and place of the hearing, shall provide adequate public notice and adequate notice to the appropriate standing committee of each house of the Legislature and to the joint committee, and shall convene the hearing at the time and place arranged.

"(c) At the hearing or hearings, the director shall take evidence of the effects the proposed repeal or amendment would have on the state's fishery resources, the commercial or recreational fishing industry, and the state's ability to manage fishery resources in state waters.

"(d) After the hearings, the director shall submit a written report to the Legislature which summarizes the reasons for the proposed repeal or amendment. [Emphasis added.]"

#### Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA generally applies to all state agencies, except those "in the judicial or legislative departments."<sup>19</sup> Since the Department is in neither the judicial nor the legislative branch of state government, it would appear that APA rulemaking requirements generally apply to the Department.<sup>20</sup>

In addition, the California Court of Appeal in Salmon Trollers Marketing Association, Inc. v. Fullerton specifically held that departmental rulemaking pursuant to Fish and Game Code section 7652 is subject to the APA.<sup>21</sup> Apparently focusing on section 7652's references to "adopt[ing] regulations," the Fullerton Court stated that "[s]ection 7652 adequately incorporates the rule-making provisions of the Government Code. . . ." <sup>22</sup> The Court continued:

"[C]learly the Director's rule-making function is subject to the provisions of the Government Code chapter establishing an Office of Administrative Law. (Gov. Code, sections 11340-11351; cf. Gov. Code sections 11342, 11343, 11346.1.)" [Emphasis added.]

We note that the Court relied upon the statutory provisions providing in essence that "all agencies" must comply with APA rulemaking requirements.

#### Procedural Background

A Request for Determination was filed with OAL on August 4, 1988, by the Salmon Trollers Marketing Association, Inc. ("the Requester"). The Requester alleges that the Department of Fish and Game "has appeared to follow its own underground regulations in conforming its salmon fishery regulation to the PFMC plan."<sup>23</sup>

The documents alleged to contain "underground regulations" are (1) a two-page cover memo dated April 29, 1988 from the Department to OAL concerning "Emergency Regulatory Order to Adopt Section 182.1, Title 14, CCR"; (2) a one-page "Statement of Emergency Regulatory Action" of the same date; and (3) a seven-page "Statement of Facts Constituting the Need for Emergency Regulatory Action" dated April 25, 1988. The documents were prepared and submitted in compliance with the APA and Fish and Game Code sections 7652 through 7652.2.

On March 10, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.<sup>24</sup>

OAL received the Department's Response to the Request for Determination on April 24, 1989. In summary, the Department argues that it was in full compliance with applicable law in conforming its commercial salmon fishing regulation to the 1988 PFMC plan.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>25</sup>

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,  
.  
.  
.  
[Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either



- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

UNSPECIFIED VIOLATIONS OF GOVERNMENT CODE SECTION 11347.5

Before addressing the specific agency rules challenged by the Requester, we must discuss the accompanying plea that OAL conduct a general search for any underground regulations that may be in use by the Department in the commercial salmon regulatory program. The Requester states:

"In light of the recent actions taken by the Department in regard to this year's [i.e., 1988] emergency amendment of 14 Cal. Code of Regs. sec. 182.1, it is apparent that the Department is following some guidelines or standards not in regulatory form, in conforming that regulation to P.F.M.C.'s plan pursuant to Fish and Game Code sec. 7650 et seq. Currently there are no administrative regulations interpreting these sections of the Fish and Game Code.<sup>26</sup>

". . . .

"These are only some of the instances in which the Department has appeared to follow its own underground regulations in conforming in salmon fishery regulation to the PFMC plan. A more in depth review of this matter by OAL will undoubtedly reveal other similar examples where the Department has, by necessity, implemented its own rules to interpret and comply with broad and vague language in the relevant sections of the Fish and Game Code." [Emphasis added.]<sup>27</sup>

We must reject this plea for a "more in depth review." In the regulatory determination process, OAL reviews only "state agency rules" which have been properly submitted to OAL by the Requester.<sup>28</sup> We cannot pass upon the validity of rules which have not even been identified.

SPECIFIC CHALLENGED RULES

Three specific items have been challenged as underground regulations: (1) the Department's interpretation of "optimum yield," (2) the consideration of economic impact information, and (3) the manner in which the Department took evidence concerning whether or not to depart from the PMFC plan, specifically, the use of a balancing test and the policy that certain evidence could be determined to justify a departure from the plan.

### FIRST INQUIRY

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.<sup>29</sup> The challenged rules appear to apply to all California commercial salmon fishermen.

### SECOND INQUIRY

The answer to the second part of the inquiry, however, is "no." For the reasons discussed below, the challenged rules do not interpret, implement or make specific the law enforced by the Department.

### Interpretation of "optimum yield"

According to the Requester, the following language constitutes a definition of "'optimum yield' [which goes] beyond the generic language of Section 7650 subdivision (e),"<sup>30</sup> a definition which should be in regulatory form:

"Optimum yield decisions take into account spawning escapement levels needed to maximize salmon production on a sustained basis; allocation of the resources among ocean and inriver users; and socio-economic impacts of regulations changes."<sup>31</sup>

The Department's view is that any guidelines which may have been used by it in promulgating section 182.1 are contained in the language of the statute and were not established by the Department. If correct, this would effectively rebut allegations that the Department is using its interpretation of the term "optimum yield" as found in section 7652.2, subdivision (a), as a standard of general application.

It is true that subdivision (e) of section 7650 of the Fish and Game Code states that "optimum yield":

"means the amount of fish which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities, and which is prescribed as such on the basis of the maximum sustainable yield from the fishery, as modified by any relevant economic, social, or ecological factor."

Thus, the first question is whether the Department has expanded this language through an interpretation adopted as a general standard.

In the Statement of Facts submitted in connection with the adoption of section 182.1 in 1988, the Department states:

"Optimum yield decisions take into account spawning escapement levels needed to maximize salmon production on a sustained basis; allocation of the resources among ocean and inriver users; and socio-economic impacts of regulations changes. All of these factors were considered in the development of the PFMC plan . . . .

". . . .

"Current state regulations affecting the commercial salmon fishery would allow overfishing of Klamath River king salmon and Oregon coastal silver salmon, thereby not meeting optimum yield criteria."

These statements of the Department's criteria include the following:

Spawning escapement levels needed to maximize salmon production on a sustained basis;

Allocation of the resources among ocean and inriver users;

Socio-economic impacts of regulations changes.

Overfishing of Klamath River king salmon and Oregon coastal silver salmon do not meet optimum yield criteria.

These factors appear to fall within the plain meaning of section 7650, subdivision (e). The challenged criteria appear to coincide with the statutory criteria and do not constitute an expansion of them. Each statutory statement is general in its terms and appears to leave room for much interpretation; however, no such impermissible interpretation appears in the record before OAL in this proceeding. Nor is the use of any unstated criterion evident from the documents submitted by the Requester or the Department. Absent some articulated standard of general application which expands upon or interprets the statute, there is no basis for finding that section 11347.5 has been violated.

#### Consideration of Economic Impact Information

The Requester also appears to challenge two "findings" contained on page 6, in Section VI, "Economic Impact of Regulatory Action," of the document entitled "Statement of Facts Constituting the Need for Emergency Regulatory Action" (hereafter, "Statement of Facts").

The Statement of Facts describes the proposed changes to the regulations as having "a significant adverse economic impact on small business in the Eureka, Trinidad, and Crescent City areas" (emphasis added). The Statement of Facts also describes the proposed changes as having "no significant cost to private persons or businesses. . . ." (emphasis added).

The Requester states:

"While these findings appear contradictory on their face, THE SIGNIFICANT QUESTION FOR PURPOSES OF THIS DISCUSSION, IS HOW THE DEPARTMENT ARRIVED AT THESE CONCLUSIONS. The Fish Game Code Sections do not mention any criteria or guidelines by which economic impact is determined, although the definition of economic yield at Section 7650(c) includes evidence of a regulation's effects on the commercial fishing industry, as evidence to be 'taken', but IT IS NOT KNOWN HOW THE DEPARTMENT GETS FROM TAKING THE EVIDENCE TO ARRIVING AT THESE CONCLUSIONS regarding economic impact.

"Apparently, the Department has engaged in an analysis of small business impacts as provided for in Government Code section 11346.53. Nevertheless, it is arguable whether the Department has met all the requirements of that section if that was its attempt. But more importantly, such small business impact analyses are not required in the emergency rulemaking procedure used by the Department in this case, and it does not appear that the standard rule-making procedural statutes (Government Code section 11340 et seq.) specifically require such analyses at all. Therefore the Department has been able to use its own economic criteria, weighing competing economic concerns, to arrive at these small business impact conclusions without the public knowing what economic criteria are determinative. Government Code SECTION 11347.5(a) REQUIRES THE DEPARTMENT TO PUBLICLY ACKNOWLEDGE THE ECONOMIC GUIDELINES AND STANDARDS IT USES BY ADOPTING THEM IN REGULATORY FORM." [Underlined emphasis in original; capitalized emphasis added.]

The Requester's contentions are unpersuasive for several reasons. First, the APA does specifically require that both small business impact and private persons/businesses impact be addressed in the notice of proposed regulatory action. If a state agency determines that a proposed regulatory action will have a significant adverse economic impact on small business, Government Code section 11346.53, subdivision (a) requires that the agency's rulemaking notice contain specified information, including the types of small businesses affected. Additionally, the APA makes clear that "private persons or businesses" are a distinct category from "small business." Government Code section 11346.53, subdivision (e) provides in part:

" A state agency shall also include in the notice of proposed action a statement of the potential cost impact of the proposed action on private persons or businesses directly affected, other than small businesses as defined in subdivision (e) of Section 11342, as considered by the agency during the regulatory development process. If the cost impact of the action is expected to be insignificant, or was not considered in the development process, the agency shall so indicate." [Emphasis added.]

The Requester's contentions are also unpersuasive for a second reason. As outlined above, "small business" and "private persons or businesses" are mutually exclusive categories. Thus, it is not at all "contradictory" for a agency to find an impact in one category, but not the other.

Third, the contentions are unpersuasive because the Department was, in furnishing economic impact information, merely complying with statutory rulemaking requirements. Agencies adopting emergency regulations often combine in one document material required to be present in the statement of emergency with material required to be present in the notice of proposed action. After an agency adopts emergency regulations, it must within 120 days publish the notice, hold the hearing, and complete the rulemaking process. If the public notice and comment process is not completed with the statutory 120 day period, the emergency regulation is repealed by OAL.

Consulting the history note to Title 14, CCR, section 182.1, we see that the rulemaking action underlying the documents now under attack proceeded as follows. The emergency regulation was filed with the Secretary of State on April 29, 1988. The Department certified that all APA requirements had been complied with on August 25, 1988. By furnishing economic impact data slightly earlier than was absolutely necessary, the Department was furthering the goal of meaningful public participation in rulemaking--one the primary objectives of the APA. Also, as acknowledged by the Requester, the Department is mandated by (1) Fish and Game Code section 7650, subdivision (e) to take into account "any relevant economic . . . factor" in determining the "optimum yield" and (2) Fish and Game Code section 7652.2, subdivision (c) to consider the proposed regulation's effect on the commercial fishing industry.

The Department, like all state agencies, is generally free to apply statutory criteria on a case-by-case basis. Absent special circumstances, such as a statutory provision mandating adoption of regulations covering a specified matter, the rulemaking agency need not develop general rules to supplement the statutory scheme. If, however, general rules are

developed to implement the statute, Government Code section 11347.5 requires the agency to adopt such rules pursuant to the APA.

Here, the Requester is again in part arguing that the Department "must be" using supplementary general rules--though the precise terms of these rules are unknown. As discussed above, such an allegation simply does not demonstrate a violation of section 11347.5. To be sure, the Department is encouraged to properly adopt any supplementary rules which experience demonstrates help it accomplish its mission. Similarly, the Requester is encouraged to utilize the statutory petition procedure<sup>32</sup> to urge the Department to adopt such supplementary rules as the Requester deems helpful. In short, we agree with the Department that the guidelines followed in the 1988 rulemaking may be found in the governing statutes.

We appreciate the Department's closing comment in its Agency Response:

"Further, the Department will review the issue of adopting a regulation to implement and clarify the language of Fish and Game Code section 7652.2. If a regulation is determined to be required, the Department will adopt a regulation, pursuant to the required public hearing process and APA procedures."<sup>33</sup>

Taking evidence; balancing test; justifying evidence

The Requester states that:

" . . . the statutes do not require the Department to do anything more than to 'take evidence' at such hearings, although . . . the Department apparently also weighs certain evidence in a balancing test and may decide not to conform the state regulation to the P.F.M.C.'s plan based on unspecified economic impacts." [Emphasis in original.]<sup>34</sup>

This contention is apparently based upon the statement that "no evidence was taken to justify not conforming" to the PFMC plan except for certain specified evidence.

We reject the contention that the way the Department considered the evidence violated Government Code section 11347.5. All we seem to have here is an application of a statutory rule in a particular case.

The Department stated that it deviated from the plan for safety reasons. While this implies a finding that the safety factor is to be considered in that particular rulemaking, it did not announce a rule of general application interpreting

the statute which would be considered to be a "regulation" within the meaning of the APA.<sup>35</sup>

That is not to say that everything the Department does now or may begin to do in the future in connection with regulating salmon fishing is consistent with section 11347.5. We simply conclude that the specific state agency rules challenged by the Requester do not violate the APA.

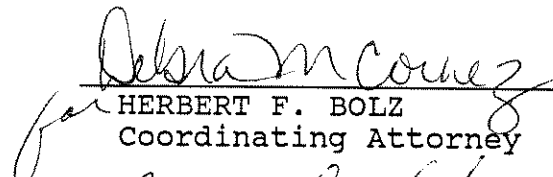
WE THEREFORE CONCLUDE THAT, ON THE FACTS BEFORE OAL AT THIS TIME, THE CHALLENGED PROCEDURES UTILIZED BY THE DEPARTMENT ARE NOT "REGULATIONS" AND THEREFORE ARE NOT SUBJECT TO THE REQUIREMENTS OF THE APA.

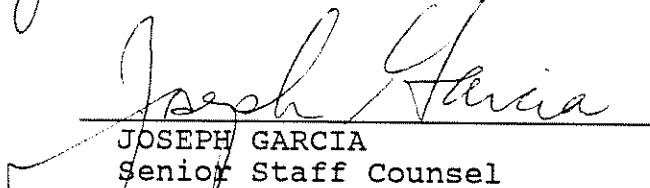
In light of this conclusion, it is unnecessary for OAL to reach the issue of whether the challenged rules fall within any established exception to APA requirements.

### III. CONCLUSION

For the reasons set forth above, OAL finds that the challenged procedures are not "regulations" and are not subject to the requirements of the APA.

DATE: June 6, 1989

  
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- 1 This Request for Determination was filed on behalf of the Salmon Trollers Marketing Association, Inc., by Steven R. Crooks, Esq., Hefner, Stark & Marois, 2710 Gateway Oaks Drive, Suite 300 South, Sacramento, CA 95833-3501, (916) 925-6620. The Department of Fish and Game was represented by Eugene V. Toffoli, Legal Advisor, Department of Fish and Game, 1416 Ninth Street, Room 1205, Sacramento, CA 95814, (916) 445-5095.

To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "333" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); California Association of Health



Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court ordered Department of Health Services to comply with statute directing the establishment of subacute care program in health facilities and the adoption of regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed --a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (1989) 257 Cal.Rptr. 450 (mandate is proper remedy to require the Department of Health Services to adopt statutorily-mandated regulations regarding temporary operation of long-term health care facilities); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit \$38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); and Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds

to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite

regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subsection (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

- 4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California

Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

The Department submitted a Response to the Request for Determination on April 24, 1989, which was considered in this determination proceeding.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of

Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for \$3.00.

- 10 Statutes 1951, chapter 715.
- 11 Fish and Game Code section 702.
- 12 Fish and Game Code section 703.
- 13 Government Code section 11349.1, subdivision (a) and section 11349, subdivision (d) (proposed state agency regulations must be consistent with existing statutes, court decisions, and other provisions of law).
- 14 Salmon Trollers Marketing Ass'n v. Fullerton (1981) 124 Cal.App.3d 295, 296-97, 177 Cal.Rptr. 362, 363-64.
- 15 Agency Response, pp. 1-2.
- 16 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the

filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17 16 U.S.C. section 1856.

18 Fish and Game Code section 7652.1 provides:

"(a) Notwithstanding any other section of this article or any other provisions of law, the director shall hold a public hearing or hearings in the area of the fishery under consideration after a recommendation by the council to the secretary of a fishery management plan or amendment thereto pursuant to the act. If the secretary approves a fishery management plan or amendment thereto which is substantially identical to the fishery management plan or amendment thereto which has been recommended by the council and the director has held a public hearing on the council's recommended fishery management plan or amendment thereto, the director is not required to hold a second public hearing under this section after the approval by the secretary.

"(b) The hearing shall be held not less than four days after the recommendation by the council to the secretary of a fishery management plan or amendment thereto or after the approval by the secretary of a fishery management plan or amendment thereto.

The director shall arrange the time and place of the hearing, shall provide adequate public notice and adequate notice to the appropriate standing policy committee of each house of the Legislature and to the joint committee, and shall convene the hearing at the time and place arranged.

"(c) At the hearing or hearings, the director shall take evidence of the effects any proposed regulation would have on the state's fishery resources, the commercial or recreational fishing industry, and the state's ability to manage fishery resources in state waters.

"After the hearings, the director shall submit a written report to the Legislature which summarizes the reasons for the proposed regulation."

- 19 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
- 20 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
- 21 (1981) 124 Cal.App.3d 291, 303, 177 Cal.Rptr. 362, 368.
- 22 Id., 124 Cal.App.3d at 305, 177 Cal.Rptr. at 369.
- 23 Request, p. 5.
- 24 Register 89, No. 8-Z, p. 509.
- 25 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.



- 26 Agency Response, p. 2.
- 27 Id., p. 5.
- 28 Title 1, CCR, subsections 121(c) and 122(a)(3).
- 29 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 127 Cal.Rptr. 552.
- 30 Request, p. 3.
- 31 Department's Statement of Facts Constituting the Need for Emergency Regulatory Action, page 1.
- 32 Government Code sections 11347 and 11347.1.
- 33 Agency Response, p. 5.
- 34 Department's Statement of Facts Constituting the Need for Emergency Regulatory Action, page 1.
- 35 Again, the consideration of the safety factor in the particular rulemaking may or may not be proper; however, that issue is not a proper subject of this determination under section 11347.5 of the Government Code.
- 36 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.